

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

BRAVE ELECTRICAL CONTRACTING, LLC d/b/a  
BRAVE GENERAL CONTRACTING, LLC

and

Case 5-CA-36058

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL NO. 80

and

Case 5-CA-36059

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS LOCAL NO. 1340

*Daniel M. Heltzer, Esq.* for the Acting General Counsel.  
*Matthew M. Yonka*, Business Manager of Chesapeake, Va.,  
for International Brotherhood of Electrical Workers Local No. 80.  
*Neil F. Gray*, Business Manager of Newport News, Va.,  
for International Brotherhood of Electrical Workers Local No. 1340.  
*Hilloah Driskill*, General Manager of Norfolk, Va.,  
for Respondent.

DECISION

Statement of the Case

ERIC M. FINE, Administrative Law Judge. This case was tried in Newport News, Virginia, on various dates beginning on March 28, 2011 and closing on May 25, 2011. The charge in Case 5-CA-36058 was filed on August 20, 2010 by International Brotherhood of Electrical Workers, Local No. 80 (Local 80) against Brave Electrical Contracting, LLC d/b/a Brave General Contracting, LLC (jointly referred to as Respondent.)<sup>1</sup> The charge in Case 5-CA-36059 was filed on August 20, 2010 by International Brotherhood of Electrical Workers, Local No. 1340 (Local 1340) against Respondent. The consolidated complaint, as amended at the hearing, alleges BGC at all material times has been the same business entity as BEC and/or that BGC is an alter ego of BEC. The consolidated complaint alleges that Respondent, an employer engaged in the building and construction industry, has granted Section 8(f) recognition to Local 80 and Local 1340, within their jurisdictional areas as defined by their collective-bargaining agreements, and that since March 5, 2010, Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from Locals 80 and 1340, repudiating their respective collective-bargaining agreements, and by failing to abide by the terms of those agreements including its failure to pay its employees with contractual wage rates, and ceasing to remit union

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<sup>1</sup> Brave Electrical Contracting, LLC is referred to individually as BEC; and Brave General Contracting, LLC is referred to individually as BGC. All dates are in 2010, unless otherwise stated.

dues, and pertaining to Local 80 ceasing to make contributions to the following entities: National Electrical Benefit Fund, Joint Apprenticeship and Training Trust Fund, Industry Fund, Virginia Electrical Industry Receiving Trust Fund, and National Labor-Management Cooperation Committee Fund; and pertaining to Local 1340 ceasing to make contributions to the Joint Apprenticeship and Training Trust Fund, National Electrical Benefit Fund, NECA/IBEW Family Medical Care Trust Fund, National Electrical Industry Fund (NEIF), Local Labor-Management Cooperation Committee Fund (LLMCC), National Labor-Management Cooperation Committee Fund, and the Virginia Electrical Industry Receiving Trust Fund.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the Acting General Counsel,<sup>2</sup> I make the following<sup>3</sup>

### Findings of Fact

#### I. Jurisdiction

Respondent, is a limited liability company organized under the laws of Virginia, with an office and place of business in Virginia Beach, Virginia, herein Respondent's facility, from where it has been engaged in the business of commercial, residential and governmental electrical contracting.<sup>4</sup> During the 12 month period from November 30, 2009 to November 30, Respondent purchased and received at its Virginia Beach, Virginia facility products, goods, and materials valued in excess of \$50,000 directly from points located outside the state of Virginia.

<sup>2</sup> On May 20, 2011, Respondent filed a request for an extension of time to file briefs from June 9, 2011 until July 25, 2011. The Deputy Chief Administrative Law Judge issued an Order on May 24, 2011, partially granting Respondent's request to extend the filing of briefs until June 23, 2011, with the caveat that no further extensions of time would be granted. Nevertheless, Respondent did not tender its brief until July 25, 2011. Respondent only tendered its brief to Region 5, with no filing with the Judge's Division as required by the Boards Rules and Regulations. It should be noted, I alerted Respondent that the brief needed to be filed with the Judge's Division during the hearing, and provided its representative with the address. On July 25, 2011, Counsel for the Acting General Counsel filed a motion to strike Respondent's brief as untimely filed, as well as four attachments referenced in the brief. Respondent alleges in the brief the four attachments relate to the employee status of seven named individuals. I have reviewed the brief which has been posted on the Agency e-room by Region 5, and find it adds nothing to this proceeding. There are no attachments to the copy I reviewed, which in any event, I would view as an impermissible attempt to insert evidence following the close of the hearing with no justification offered by Respondent for the belated effort to do so. Moreover, counsel for the Acting General Counsel asserts in its motion the purported documents, if they exist, should have been produced in response to his subpoena, which he states they were not. For the reasons stated, I have granted the motion to strike Respondent's brief from the record, as well as any referenced documents cited therein, as untimely and improperly filed.

<sup>3</sup> In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony has been considered, if certain aspects of a witness' testimony are not mentioned it is because it was not credited, or cumulative of the credited evidence or testimony set forth above. Further discussions of the witnesses' testimony and credibility are set forth in this decision as necessary.

<sup>4</sup> Respondent admitted the forgoing during the hearing on March 28, 2011. (Tr. 114-115).

During the same time period, the employers represented by employer association ACC-NECA, which also represents Respondent for purposes of collective-bargaining with Locals 80 and 1340 performed services valued in excess of \$50,000 in states other than the state of Virginia. Based on these findings, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>5</sup> Respondent admits, and I find that Locals 80 and 1340 are each labor organizations within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

Neil F. Gray is the business manager of Local 1340, and he began that position in July 2010. He was previously the assistant business manager and referral agent of Local 1340, positions he began in 2003. While assistant business manager Gray reported to then Business Manager James Avery. Local 1340 has around 525 to 550 members. Local 1340 has contracts with about 25 signatory construction employers to its Inside collective-bargaining agreement. The employers are represented by an employer association known as the National Electrical Contractors Association (NECA). More specifically, Local 1340 deals with the Atlantic Coast Chapter of NECA (ACC NECA). Gray testified NECA is an employer based organization for the construction industry which exists for the purpose of negotiating and administering collective bargaining agreements with the IBEW.

On September 30, 2003, Driskill signed a Letter of Assent-A authorizing the Hampton Roads Division, Atlantic Coast Chapter, NECA for all matters contained in or pertaining to the current or any subsequent approved Inside labor agreement between the Hampton Roads Division, Atlantic Coast Chapter, NECA and Local 1340. It states BEC agrees to comply with, and be bound by, all of the provisions contained in said current and subsequent approved labor agreements effective September 30, 2003. It states the letter of assent shall remain in effect until terminated by the undersigned employer giving written notice to the Hampton Rhodes Division, Atlantic Coast Chapter, NECA and to Local 1340 at least 150 days prior to the then current anniversary date of the applicable approved labor agreement.

<sup>5</sup> Respondent was represented at this hearing by Hilloah Driskill, the general manager and owner of BEC and BGC, who also appeared as the only witness for both entities. Hilloah Driscoll is the only individual named Driskill to testify in this proceeding and as such she will be referred to as Driscoll in this decision. Jeff Driskill, who works for Respondent, will be referred to as Jeff Driskill. Driskill's testimony was marked by an effort to recant prior signed admissions that Respondent met the Board's commerce requirements in one of its answers to the complaint, in the form of signed commerce questionnaires tendered to the Region in September 2010; and by an effort to recant large portions of her testimony in her pre-hearing affidavit dated October 14, 2010, although she subsequently stated in a December 13, 2010 statement to the Region referencing that affidavit that, "The testimony was honest and complete." Ms. Driskill testified she had a master's degree in chemistry. However, her behavior at the hearing was marked by a belated and piecemeal tender of subpoenaed documents, and a refusal to tender other subpoenaed materials although she was directed to do so. Similarly, her testimony was marked by what could only be an intentional failure to recall answers to questions, and a complete refusal to answer other questions although she was directed to do so. Ms. Driskill denied Respondent engaged in commerce within the meaning of the Act. Based upon the submitted evidence as well as reasonable inferences, noting Driskill's refusal to answer certain questions, and to supply certain subpoenaed records, I have concluded Respondent in fact is an employer in commerce meeting the Board's requirements as set forth above. My conclusion that Respondent is an employer in commerce will be further discussed in the Analysis section of this decision.

Gray testified the letter of assent signed by Respondent binds employers to future collective bargaining agreements, unless they give timely notice stating they no longer want to be bound. He testified in order to terminate the letter of assent; the employer is required to give written notice to the Hampton Roads Division, NECA and to the local union at least 150 days prior to the expiration of the current collective-bargaining agreement. Gray testified once the employer gives timely notice they are still bound by the terms of the collective-bargaining agreement until its expiration. Gray testified BEC and/or BGC never gave notice to Local 1340 that Respondent intended to terminate its letter of assent. He testified NECA never notified Local 1340 that Respondent intended to terminate the letter of assent.

Article 3.10 of the December 1, 2008 to November 30, 2011 Inside Agreement between Local 1340 and ACC NECA sets forth the geographical jurisdiction of Local 1340. Section 3.09 of the Agreement sets for the job classifications and wage rates. Gray testified there are additional classifications of construction electricians 1 to 3 and construction wireman 1 to 4 to those set forth in the agreement. Section 1.02 of the collective-bargaining agreement labeled "Notification of Change" provides that:

Either party or an Employer withdrawing representation from the Chapter or not represented by the Chapter, desiring to change or terminate this Agreement must provide written notification at least 90 days prior to the expiration date of the Agreement or any anniversary date occurring thereafter.

Gray explained that after an employer terminates its letter of assent with NECA with the 150 days written notice to NECA and the local union, the employer who wishes to terminate its collective-bargaining agreement with the local union would then need to also notify Local 1340 in writing at least 90 days prior to the expiration of the current collective-bargaining agreement of their desire to terminate the collective-bargaining agreement. Gray testified they would then have to go through a process of trying to negotiate a subsequent collective-bargaining agreement and/or go to interest arbitration at the end of that agreement.<sup>6</sup>

Gray testified Local 1340 runs an exclusive hiring hall under article 4 of the referenced 2008 to 2011 Inside agreement. Gray testified the referral process is that an employer notifies Local 1340 that it needs a certain amount of employees and local 1340 refers that number to the employer. The employer generally gives the union a job description including where the employee is supposed report and what special conditions exist for the job such as if there is a drug test requirement. Local 1340 then refers those employees and Local 1340 produces a job referral slip for the employer so the employee can go to work. Gray testified an employer is only permitted to secure employees off the street if Local 1340 is unable to provide workers upon an employer's request.<sup>7</sup> Workers hired off the street are designated as temporary employees.

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<sup>6</sup> Gray and Yonka described an interest arbitration provision contained in their local's collective-bargaining agreements which they claimed that even after an employer gives timely notice to terminate its letter of assent as well as the immediate collective-bargaining agreement, that the employer would still have to go to interest arbitration, which counsel for the Acting General Counsel claims could lawfully bind the employer to one more collective-bargaining agreement. Since, I have concluded in this decision Respondent did not give proper notice to terminate its letters of assent or the local union's collective-bargaining agreements, the interest arbitration issue is not before me, and I make no findings or conclusions concerning it.

<sup>7</sup> The collective-bargaining agreement generally allows Local 1340 48 hours to refer an applicant before the employer can hire temporary employees off the street. The collective-

Continued

Gray testified the employer is required to furnish Local 1340's business manager with the names and social security numbers of temporary employees and replace those employees when applicants through the hiring hall procedure are available.

5           Gray credibly testified that since 2003, Respondent never made a request for workers that Local 1340 was unable to fill and that Local 1340 has never refused to provide workers requested by Respondent's personnel. Gray testified Respondent has since 2003 never notified Local 1340 that Respondent was using temporary employees as required under the Inside agreement. Gray testified he thought the last time Respondent made a request for personnel  
10           from Local 1340 was sometime in 2008. Gray testified temporary employees, that is employees hired off the street, receive the collective-bargaining agreement wage and benefit package.

          Gray testified a Board 63 form is a form employers signatory to the collective-bargaining agreement fill out reporting the amount of man-hours they work, the names of their employees,  
15           and the employees: gross earnings, gross health and welfare earnings, and gross pension earnings allowing signatory employers to make these payments with one monthly check as provided for in article 11 of the collective-bargaining agreement. Gray testified the Board 63 form also includes funds for the apprenticeship program and for the local labor management cooperation committee. The employer writes one monthly check which goes to the Board 63  
20           collection account which is managed by NECA. NECA in turn disperses monies sent to the appropriate fund on the employer's behalf. Gray identified the Board 63 form for January 30, 2010 to February 26, 2010 signed by Driscoll for BEC. It reported zero earnings and zero clock hours. This form is dated March 12, 2010, near Driskill's stamped signature. Gray testified Local 1340 receives copies of Board 63 forms on a regular basis. Gray testified that prior to this  
25           form, Respondent filed Board 63 forms every month since they had been signatory to the agreement in 2003. Gray testified employers are required to file the form on a monthly basis even if they have no employees. Gray testified the March 12, 2010 form was the last one Respondent filed. Gray testified that since March 2010, Respondent has never remitted dues contributions or made fund contributions as required by the collective-bargaining agreement.

30           Matthew Yonka has been the business manager for Local 80 since July 2005. Yonka testified Local 80 deals with about 25 employers as part of NECA. Driskill signed a Letter of Assent-A on October 31, 2003, authorizing the "Union Employer's Section, Tidewater Division, ACC, NECA" to represent BEC in collective bargaining with Local 80. The letter of assent  
35           contains the same 150 day written notice to NECA and Local 80 termination requirements as the letter of assent Driskill signed in 2003 relating to Local 1340 and NECA. Yonka testified BEC's signing the letter of assent authorized the chapter of NECA to represent BEC in collective-bargaining with Local 80, and bound BEC to the Inside collective-bargaining agreement and to future agreements. Yonka credibly testified that from 2005 to the present  
40           Local 80 was never notified that BEC or BGC intended to terminate the letter of assent.

          The current Inside collective-bargaining agreement between Local 80 and ACC NECA runs from March 1, 2010 to May 31, 2013. Section 3.09 of the agreement sets forth the geographical jurisdiction of Local 80. Local 80 has around 700 members which include  
45           journeyman wireman, apprentice foreman, construction electrician, construction wireman, and pre-apprentice classifications. Section 1.02 of Local 80's Inside agreement contains the same 90 day written notice of termination requirement contained in that section of Local 1340's Inside

50           bargaining agreement confirms Gray's description of the referral process as set forth above. It also provides at section 4.03 that "The employer shall have the right to reject any applicant for employment."

agreement. Yonka testified to the same termination procedures for Local 80, as did Gray for Local 1340, which he described as culminating in interest arbitration for a new agreement after an employer files timely written notice of termination of its letter of assent to Local 80 and NECA, and thereafter a second letter to Local 80 timely terminating the collective-bargaining agreement. Yonka testified if an employer does not terminate the letter of assent first it cannot terminate the Inside agreement.

Yonka cited article 4 of the collective-bargaining agreement designating Local 80 as the exclusive referral source for employment applicants. The referral provision is similar to that described above for Local 1340 giving an employer the right to reject any applicant and Local 80 48 hours to meet an employer's referral requests. If Local 80 is unable to provide requested workers within 48 hours, an employer can hire off the street but it must provide the names and social security numbers and classifications of those workers to Local 80 and they are classified as temporary employees subject to replacement when Local 80 has workers available. Yonka testified the collective-bargaining agreement wage rates apply to temporary employees.

Yonka credibly testified that since 2005, Respondent has never made a request for workers in Local 80's jurisdiction that Local 80 was unable to fill. He testified Local 80 has never ignored Respondent's requests for workers. Yonka testified the last time Respondent requested workers from Local 80 was around October 2008. He testified this work was within Local 80's jurisdiction, and Local 80 referred workers.<sup>8</sup>

Yonka identified a Board 63 form for BEC signed by Driskill, dated March 12, 2010, covering the period of January 30 to February 26. The form shows zero dollars for contributions for Local 80. Yonka testified that prior to filing this Board 63, Respondent filed Board 63 forms every month from the date they became signatory and had an employee with Local 80 which was in 2003. He testified employers are required to submit the form every month even if they have no employees. He testified, the March 12, Board 63 form was the last form Respondent submitted.

On February 23, 2010, Attorney Douglas Nabhan sent a certified letter to Yonka, business manager Local 80, Avery, business manager local 1340, and James Underwood, business manager Local 666. The letter states Nabhan's law firm represents BEC. It states BEC hereby notifies the three named locals that it "repudiates any and all agreements between the parties. Under the law where an employer employs one or fewer employees on a permanent basis, the employer may withdraw recognition from the union, repudiate its contract with the union and unilaterally change employees' terms and conditions of employment." The letter cited *D & B Masonry*, 275 NLRB 1403 (1985) in support of Respondent's actions. The letter states "We will presume that the Unions accept this repudiation unless we hear to the contrary no later than March 5, 2010 at 5:00 p.m." Gray testified he first saw this document around April 2010. Gray testified Local 1340 did not view the letter as notice to terminate in accordance with the proper procedures in the contract which was in force until November 30, 2011. Gray testified he did not respond to the letter, and to his knowledge Local 1340 did not respond.<sup>9</sup> Yonka testified he also received Nabhan's February 23, 2010 letter. He testified the letter was not timely as it was received on February 23, and the existing contract expired on

<sup>8</sup> Yonka testified once in 2008 Respondent placed a request to Local 80 for workers for work performed outside of Local 80's geographical jurisdiction. As a result, Local 80 was unable to refer Respondent workers for that job.

<sup>9</sup> Gray had replaced Avery as business manager of Local 1340 at the time of this correspondence.

February 28, 2010. Yonka testified he did not view it as adequate notice of termination.

Nabhan sent Yonka and Avery a letter dated May 6, referencing BEC. He stated this is the second time he was writing asking for help with respect to BEC. Nabhan stated, "Will you please do me a favor and send me a letter that states that Brave Electrical is no longer a unionized contractor. I will owe you one." On August 5, Nabhan wrote Gray and Yonka, attaching Nabhan's two prior letters, asking that Gray and Yonka contact Nabhan or have their attorney contact Nabhan so they could get the matter resolved with "DOLL".

By letter dated August 19, sent by e-mail and regular mail to Nabhan, attorney Jonathan Newman stated he was representing Locals 80, 666 and 1340 and responding to Nabhan's letter of August 5, 2010. Newman stated that "Brave Electrical has purported to repudiate its collective-bargaining agreements with the IBEW locals based on your assertion that Brave Electrical employs one or fewer employees on a permanent basis." Newman stated "so that the locals may administer their agreements effectively and investigate any potential grievances please provide the following information:" The information requested pertaining to BEC included: the names and addresses of all current employees; the names and addresses of all employees employed since January 1; a list of all projects performed since January 1; a list of all jobs that BEC has bid on, but not yet started; a list of all jobs for which BEC is contemplating bidding, but has not yet bid. The letter requested the information be provided by September 2.

On August 20, Driskill sent an email to Newman, Nabhan, Jeff Driskill, and herself stating, "The name of Brave Electrical Contracting, LLC is in the process of being changed in all capacities except IBEW to Brave General Contracting, LLC. This is done as an acceptable business practice without ever or any intention of deception."

On September 24, Driskill faxed Newman a cover letter using a BGC letterhead with a two page attachment, which by its terms was in response to Newman's August 5 request for information. Driskill's letter stated there were two current employees, naming Jeff Driskill and Jeff Douglas. The attachments included on the second page an employee contact list naming nine persons and providing their addresses. The last page contained a 2010 job list naming 22 projects.<sup>10</sup> Driskill testified she did not include residential jobs on the list, but she testified Respondent also performed residential jobs in 2010.<sup>11</sup> It stated "none" as to jobs Respondent had bid on and not started, and for jobs Respondent was contemplating bidding on.

<sup>10</sup> Of the jobs Driskill listed as being performed in 2010, Gray testified he was aware that the Carrolton House, North Pheobus Geothermal Replacement, Vision Machine Disconnect, 1913 Hart Circle Renovation, and LAFB Public Address were within Local 1340's jurisdiction; and that Camp Allen Chiller Replacement, and Old Dominion Contract were with Local 80's jurisdiction. Yonka testified the Old Dominion contract was within the jurisdiction of Local 80. Gray and Yonka were unsure of the location of some of the other jobs listed as to whether they within the jurisdiction of their locals.

<sup>11</sup> The letters of assent Driskill signed with Locals 80 and 1340 only listed Respondent as being bound by the Inside agreement. However, there was testimony that the local unions maintain a separate Residential agreement with lower pay rates. I do not find Respondent to be bound by the Residential agreement by the terms of its letters of assent. It is argued by counsel for the Acting General Counsel that the Inside Agreement also covers residential work. The union recognition provision article 2.04 of the Inside agreement for both locals reads that for an employer it covers "all of its electrical employees performing work within the jurisdiction of the Union...". There is nothing in the agreement to preclude its coverage of residential work.

On October 1, Newman sent Driskill a letter by fax, email and regular mail on behalf of Locals 80, 666, and 1340. The letter stated Driskill and Newman spoke by phone on September 24, at which time Driskill stated that BEC and BGC were not represented by counsel for NLRB matters. In his October 1, correspondence, Newman made an information request in response to Driskill's letter of September 24, 2010. Newman asked for the dates each of the nine named employees worked for BEC and/or BGC; and the dates BEC and/or BGC worked on the listed projects included in Driskill's 2010 job list. Newman stated that when they spoke on September 24, Driskill indicated that BEC and/or BGC was seeking projects as a sole source contractor, rather than through competitive bidding. He asked Driskill to clarify and confirm that BEC and/or BGC was continuing to seek projects on a sole source basis, and for Driskill to identify any projects for which work has not yet begun or for which BEC or BGC has been awarded a sole source contract, and any projects for which they are contemplating seeking sole source contracts. Newman stated that when they spoke on September 24, Driskill informed Newman that BEC and BGC were the same company. He stated please confirm they are the same and/or provide an explanation on the structure of each company.

On October 1, Driskill responded by fax to Newman from BGC. Driskill stated both names are for the same company, stating "Brave General Contracting, LLC sole member, Hilloah Driskill and formerly Brave Electrical Contracting, LLC sole member, Hilloah Driskill." Driskill stated it was incorrect to state BGC can bid as a sole source as the U.S. Department of Commerce Small Business Administration was withholding that ability. Driskill stated there was one project bid between September 24 and October 1, and it was not a sole source bid. Driskill stated BGC has not been awarded any contracts or sole source since there is no work appropriate for BGC to bid at this time, except the listing of jobs attached. Driskill attached a packet of documents to her response, which included employee time sheets. There were time sheets included for: Jeff Driskill showing he worked various hours from December 26, 2009 to September 24, 2010; Jeff Douglas showing he worked various hours from January 2 to September 24, 2010; for Clifton Tomlinson showing he worked various hours from March 22 to June 25; for John Wells showing he worked various hours from April 17 to September 17; for Daniel Scriver showing he worked various hours from May 22 to July 30; and for Bryant Page showing he worked various hours from August 7 to August 20.<sup>12</sup>

Lawrence Moter, Jr., works for the ACC NECA as the Executive Director, which he testified is a trade association formed to service union electrical contractors. It is a multiemployer association. ACC NECA's geographical area includes portions of Virginia, North Carolina, and South Carolina. ACC NECA has around 30 formal employer members and it has a multi-employer bargaining unit with a number of contractors, which are not formal members, but have assented to ACC NECA representation by signing the letters of assent A or B. Moter testified typically an employer seeking to have a collective-bargaining agreement with a local union in ACC NECA's jurisdiction will sign an assent which binds it to the multiemployer bargaining unit.

<sup>12</sup> Driskill testified she did not recall receiving the October 1, 2010 letter from Newman. However, she did not deny receiving it. Driskill testified she may have faxed the documents to Newman attached to her October 1 letter to Newman. Driskill testified she did not recall whether she ever spoke to Newman on the phone. She testified she was not denying it. These types of answers were consistent throughout Driskill's testimony by her refusing to admit the obvious, while at the same time not denying it. I find as set forth above that Driskill did fax the documents attached to her October 1 response to Newman, that she did speak to Newman on the phone as the correspondence suggests, and that, contrary to her testimony, she in fact did recall her part in the chain of correspondence as well as the phone call.



Moter testified it was his understanding BEC primarily operated for government and commercial contractors in the Norfolk, Newport News, and Hampton area. Moter testified BEC's letters of assent with Local 80 and Local 1340 are still in effect. Moter testified signing the letter of assent binds an employer to the current collective-bargaining agreement and unless the employer terminates the letter of assent properly they are bound to future collective-bargaining agreements. He explained termination of the letter of assent requires 150 days written notice prior to the contract expiration date to both the local union and NECA by the individual contractor. Moter testified when an employer gives timely and adequate notice to terminate the letter of assent they are still bound by the collective-bargaining agreement in effect until its expiration, and possibly its successor agreement.

Moter testified ACC NECA never received a notice that BEC or BGC intended to terminate its letter of assent with NECA concerning Local 1340 or Local 80. Moter testified he had no knowledge of BGC as all his dealings were with BEC. Moter testified from ACC NECA's perspective Respondent is still bound by the letters of assent. He testified if a company changes its name it is ACC NECA's position that they are a successor and are still bound by the letter of assent.

Moter testified that signing a letter of assent does not necessarily make an employer a member of NECA. The association has separate paperwork to obtain membership. He testified if an employer terminates its NECA membership or its membership is terminated from the association it has no effect on the letter of assent. Moter testified formal NECA members pay a fee to NECA and they become a formal member by signing an application which has to be approved by the Board of Directors. Moter testified that a few months after BEC signed their letters of assent they signed an application to be a formal member of NECA and they were a formal member until early 2010. Moter testified BEC was formally terminated from ACC NECA and the national NECA on February 23, 2010 for non-payment of BEC's monthly membership dues. Moter testified termination letters from NECA have no impact on the letters of assent signed by Respondent.

Moter testified the Board 63 form is a payroll reporting form for an employer to submit contract benefits and deductions to the Board 63 receiving fund. It is a one check system for all employer obligations. All assented employers are required to file Board 63 forms on a monthly basis that are currently working in the industry. Moter testified that, prior to filing its Board 63 forms for Locals 80 and 1340 dated March 12, 2010, BEC was filing a Board 63 form pretty much every month since they signed a letter of assent in 2003 for each of the local unions. The March 12, 2010 forms were the last ones BEC filed for the named locals. Both forms covered the period of January 30, 2010 to February 26, 2010. Moter testified a blank Board 63 form means an employer has no workers for that month and it is common for an employer to file a blank form. Moter testified that since March 2010, Respondent has never made contributions required by the collective-bargaining agreements between ACC NECA and Locals 80 and 1340.

E.G. Middleton is an electrical contractor that signed NECA letters of assent for the Inside agreement to be bound by the NECA agreement with Local 1340 in 1968, and Local 80 in 1973. Blackwater Electric is an electrical contractor that signed letters of assent for Local 1340 in 1999 and Local 80 in 2005. Moter identified records submitted to ACC NECA by E.G. Middleton and Blackwater showing that for 2010, E.G. Middleton paid gross pay of \$60,414 for work performed in North Carolina and over one million dollars for work performed in Virginia; and Blackwater paid \$969,591 in gross pay for work performed in North Carolina and around \$6 million for work performed in Virginia.

## A. Respondent's presentation

Driskill is the owner and general manager of BGC and BEC. Throughout this proceeding, Driskill who served as Respondent's representative displayed an approach to intentionally obfuscate and delay. On March 28, 2011, the first day of the hearing, while the consolidated complaint related to matters in 2010, Respondent only produced subpoenaed materials through December 2009. Driskill claimed a bankruptcy proceeding involving the Department of Justice prevented her from producing more current records. Counsel for the Acting General Counsel subsequently represented he contacted the government attorneys involved in that litigation based on phone numbers provided by Driskill and he was told the aforementioned litigation served as no impediment to Driskill's producing subpoenaed materials for this unfair labor practice proceeding. Driskill declined the opportunity to call those attorneys on her own to verify this assertion.

Respondent failed to substantially comply with the counsel for the Acting General Counsel's outstanding subpoena request on March 28, 2011. As a result, Driskill took the stand on that date and was questioned about production of documents on a paragraph by paragraph basis of the subpoena. Along these lines, counsel for the Acting General Counsel asserted Driskill had not complied with subpoena paragraph 24 calling for the production of payroll records.

As to subpoenaed documents pertaining to the corporate status of BEC and BGC, on March 28, 2011, Driskill only produced one document, which was the minutes of a meeting held on October 10, 2007. She testified there were no annual reports filed for either company. Driskill testified BGC had no statement of mission or purpose. When asked about BEC, Driskill testified, "The name of the business is Brave General Contracting." She testified BEC and BGC are the same business. Driskill testified there are no separate documents for either company. Driskill testified there are no corporate filings in that BGC is a limited liability company.

Concerning motor vehicles used by Respondent, Driskill produced vehicle registrations, but testified she did not own the title to any of the vehicles and she does not have lease agreements for them. However, Driskill testified she is making monthly payments on the vehicles. She testified there are no documents that show how she came to possess the vehicles. Respondent provided motor vehicle registrations showing a registration for a Ford pickup issued on January 27, 2011, a Honda hatchback issued on August 17, 2010, and a Ford truck issued on May 30, 2010 all issued to BEC.

The subpoena requested documents showing material Respondent purchased from vendors including Graybar, Westco, Eck and RexEl. Driskill stated she could not produce these documents for 2010 and beyond because the vendors were listed as claimants in the bankruptcy proceeding. Driskill later testified the documents were not accurate because she did not know if the vendors would be paid and she was not going to produce something that was not accurate. Driskill finally stated she would produce what she had. She testified she did not have any receipts, and she stopped entering these records into any type of a system. Driskill testified the vendors send her a statement, but she did not retain the statements. She testified she would ask the four vendors specifically named in the subpoena to give her statements from January 1, 2010 through March 29, 2011. She testified, "I do not want to include the dollar amount." Yet, she testified she was denying Respondent was covered by the commerce standards under the Act. As a result on March 28, 2011, Driskill was instructed to bring the dollar amounts of her purchases and to bring information as to all vendors as required by the subpoena, not just the four specifically named.

Regarding, the subpoena request for Respondent's fixed assets, Driskill on day one of the hearing provided a report up to November 28, 2010. She testified she was still working on the report for her taxes. She testified she had not purchased anything since November 28. However, Driskill tendered no underlying documents such as receipts and cancelled checks in support of her report. She was instructed to bring in those types of documents. She testified she did not think she could find receipts. On day one of the hearing, Driskill failed to produce documents showing which general contractors Respondent functioned as a subcontractor for during the years 2010 and 2011. As to the subpoena request for all documents showing Respondent's classification as a contractor, Driskill produced no documents dated prior to April 2011. She testified there were earlier documents, but they expired and she threw them away.

Paragraph 9 of the subpoena required the production from August 1, 2009 to the present all documents showing the financial expenditures by category of Respondent. Other than a letter she authored to counsel for the Acting General Counsel, Driskill produced no documents. Driskill initially testified she had no documents in her possession, including canceled checks which show financial expenditures. Driskill testified she had produced documents in response to subpoena paragraph 5 which related to paragraph 9, but they stopped as of December 2009. She then testified she would get more current documents in response to paragraph 9, if she could find them.

Driskill at first testified she used her private phone for her business. She then testified she does not use it for her business. She claimed to make calls on a pay phone, "or somebody's office or something." Driskill testified she did not have an office; rather she had a post office box. She testified she uses email with her customers, but it is someone else's account.

Paragraph 10 of the subpoena requested all documents constituting or relating to financial statements, balance sheets, profit and loss statements, federal and state income tax returns, and personal property returns that show gross revenues or income for services provided by or costs incurred by Respondent from August 2009 to the present. Respondent produced tax filings for 2009, but not for 2010. Driskill testified Respondent was in bankruptcy in 2010, and as of March 28, 2011 she had not filed her 2010 tax return. Driskill testified she did not have balance sheets or profit and loss statements for 2010. She denied that records existed that she did not bring. Driskill testified she produced a balance sheet and profit and loss statement for 2009, but did not have it for 2010. She testified she did not give the 2010 documents to the bankruptcy proceeding. She testified they never existed. Driskill testified she did not have these documents for 2011. Driskill testified she threw away her Virginia tax forms for 2009. She denied having a computer with any of these documents. However, Driskill testified she would be filing both state and federal taxes on April 15, 2011 for 2010, but she produced no underlying financial records that were to be used to create those returns.

As to paragraph 18 of the subpoena relating to correspondence between Respondent and the various benefit funds listed in the collective-bargaining agreements, which included the Tidewater Electrical Industry Health Fund and the Tidewater Electrical Industry Pension Fund, Driskill produced no documents. Driskill testified on March 28, 2011 that nothing exists responsive to paragraph 18. Driskill testified there may have been emails. However, Driskill testified her system crashed and she lost all of her emails.

Driskill testified she did not have any documents showing she was denied workers from the Union. However, Driskill testified an individual was told to stop working by the Union for her business, and she had to hire independent contractors to finish the job. She testified she had a time sheet showing the last day he worked. At that point, Driskill was instructed to bring the

time sheet to the hearing, as she had not previously produced it. Driskill testified she had produced a document through 2009 concerning her use of temporary employees. She testified she has not used temporary employees since that time. Driskill testified she tried to comply with the collective-bargaining agreement and request employees from the Union and a worker was withdrawn from her jobsite by the IBEW.

Driskill resumed the witness stand on March 30, 2011, the third day of the hearing, as an adverse witness. Counsel for the Acting General Counsel produced five commerce questionnaires with Driskill's hand stamped signature, each containing a signature date of September 3, with different NLRB case numbers. The latter three showed they were faxed from Driskill's fax machine on September 24 and 27. Driskill admitted authoring the first two forms, but denied knowledge of the remaining three. Despite her denial, given the conformity of the signature stamp used on all the commerce forms and the latter three having Driskill's fax number on them, I have concluded Driskill completed all five forms, or that they were completed at her direction and tendered to the Region on her behalf in response to unfair labor practice charges. In the forms, Driskill admits Respondent is a sole proprietorship in the building and construction industry. In the forms, she denied purchasing \$50,000 goods and materials or services directly from outside the state of Virginia. She did admit in the forms, in the past calendar year making purchases equal to or above \$50,000 from firms which in turn purchased those goods directly from outside the state of Virginia.<sup>13</sup>

The initial consolidated complaint issued on November 30 concerning commerce alleged in paragraph 3(b) that within the preceding 12 months, Respondent purchased and received at its Virginia Beach facility products, goods and materials valued in excess of \$50,000 directly from points located outside the state of Virginia. In a document entitled amended answer to the consolidated complaint filed on February 3, 2011, Driskill admitted paragraph 3(b) of the consolidated complaint. The Acting General Counsel amended the consolidated complaint at the hearing to add paragraph 3(c) listing employers in a multi-employer association including BEC and BGC as performing services valued in excess of \$50,000 in states other than Virginia. Driskill filed a new answer wherein she now denied paragraph 3(b) and also denied paragraph 3(c). Driskill testified she initially admitted paragraph 3(b) because it was true, but because Respondent is in bankruptcy her answer changed because the referenced goods will be called back or not paid for "or prosecuted in a civil suit or something of that sort...". She testified her business never paid that amount of money for interstate goods during that time period. Driskill initially testified she received the goods, but she did not purchase them. Driskill then testified the goods were received by the general contractor, and the general contractor is responsible for the payment for them, rather than Respondent. Driskill supplied no documentary evidence in support of this assertion.

Driskill testified she received a letter dated October 7, from Region 5, pertaining to a series of unfair labor practice charges including the ones involved in the current proceeding. The letter included 25 paragraphs setting forth questions. The letter also contained 19 paragraphs including subparagraphs requesting the production of documents from Respondent. Driskill identified a document containing her stamped signature and BGC's letterhead, which provides a detailed response to the Region's request for information. However, when asked if she submitted the document with attachments to the NLRB, Driskill responded, "I don't know." She testified she was not denying she typed the document, but claimed she did not recognize it. Driskill testified she could have submitted all of the attachments to the NLRB, she just did not

<sup>13</sup> The latter was not alleged in the consolidated complaint as a basis for asserting jurisdiction over Respondent.

know. I do not find Driskill's explanation credible here. The submission to the Region from Respondent is dated October 16, and provides a detailed response to the Region's request for information. Driskill was testifying on March 30, 2011, I have concluded she did file the October 16 response with the attachments as presented in the Acting General Counsel's exhibit, and that in fact she remembered doing so at the time of her testimony.

The Articles of Organization for BEC forming a limited liability company under the Virginia Code are dated July 7, 2003. It is stated therein the sole and specific purpose of the company "shall be to engage in the business of commercial, residential and governmental electrical contracting." However, the operating agreement for BEC adopted September 1, 2003, provides that in addition to electrical contracting, "nothing therein shall be deemed as prohibiting the Company from extending its activities to any related or otherwise permissible lawful business purpose...". Driskill filed an amendment to BEC's Articles of Organization with the state of Virginia on July 28, 2010, changing Respondent's name from BEC to BGC. In this regard, Driskill testified both BEC and BGC operate under the same articles of organization. Respondent produced a document entitled "Articles of Organization" dated July 19, 2010. It states everything remains the same except the name has changed to "Brave General Contracting, LLC". It has a blank signature line with Driskill's typewritten name printed there.

Driskill denied at the hearing that BEC performed light industrial work. However, in her pre-hearing affidavit signed October 14, 2010, she testified BEC performed light industrial, commercial, restoration, remodeling, governmental and new building work. Driskill testified, in the affidavit, BGC also performed light industrial, commercial, restoration, remodeling, governmental and new building work. In the affidavit, Driskill also stated:

While I operated under the name Brave Electrical, we bid on and performed specialty electrical subcontracting work, including but not limited to lighting, conduit, and panel electrical work. In July 2010, I decided that I wanted to pursue general contracting work, including, plumbing, carpentry, HVAC and concrete work..... Since I changed the name to Brave General Contracting, LLC I have only bid on one job where, if awarded, we'd be the prime general contractor. A union electrical subcontractor is involved in this bid. Since I changed the name to Brave General Contracting, LLC, we have not performed any general contracting work. Brave General Contracting, LLC has continued to perform specialty electrical subcontracting work.

Driskill testified Jeff Driskill is an employee of hers. When asked at the hearing, if including Jeff Driskill BGC had nine employees in 2010, Driskill testified, "I can't be sure of that." When asked how many employees she thought she employed Driskill testified, "I don't know." Driskill testified she could have possibly employed nine employees in 2010. However, Driskill's affidavit states, "As I will discuss below, during 2010, we employed eight employees not including Jeff Driskill as electricians and assistants to electricians."

When asked at the hearing, if there was no change in customers for BGC from BEC, Driskill testified that was not correct. However, her affidavit states, "Our customers and vendors have not changed since I changed the name from Brave Electrical Contracting, LLC to Brave General Contract, LLC. I started using the following vendors in 2003 and I continue to use them to this day: Graybar, Westco, Eck and Rex El. These vendors have provided and continue to provide us with the following materials: light poles, conduit, fixtures, wire, switches, covers plates, transformers, breakers and panels. Paul Davis is one customer who contracted with us under Brave Electrical Contracting, LLC and Brave General Contracting, LLC. The following general contractors contracted with us as electrical subcontractors under Brave Electrical Contracting, LLC and Brave General Contracting, LLC: Excel Paving, Elswick Construction and

Mahalo.”<sup>14</sup> In her affidavit, Driskill cites Nabhan’s February 23 letter, and she states, “Since the date of that letter, Brave Electrical Contracting, LLC and then Brave General Contracting, LLC have sought and performed work.” She stated in the affidavit that most of the work that BEC and BGC have bid on and performed since February 23, 2010 has been electrical subcontracting work.

Driskill testified, at the first day of the hearing, that she did not use credit cards. However, a document subsequently submitted into evidence dated March 21, 2011, showing that Locals 80 and 1340 were added as creditors in BGC’s bankruptcy proceeding included a list of Respondent’s creditors including American Express, Bank of America, Capital One and Chase with the amount of the claim next to each creditor. Driskill refused to answer what she had incurred the claimed debt for with respect to these creditors. The list of creditors included a claim from Graybar with an Atlanta, Georgia address in the amount of \$27,357.39 incurred in 2010; a claim from Wesco Receivables Corp with an Atlanta address of \$3,557.52 incurred in 2010; the American Express claim was reported as incurred in 2010 in the amount of \$4,769.00.<sup>15</sup>

Driskill testified she could not recall what work her company performed in 2010. She testified she did not send out the bids. Driskill testified estimators send out bids without her approval and she did not know what projects were bid on. The only estimator whose name she recalled was Jeff Driskill. Driskill testified there were other estimators besides Driskill in 2010. However, Driskill also testified Jeff Driskill could have generated all of the bid quotes. Driskill testified she occasionally went out to jobsites in 2010, but when asked what sites she visited her response was, “I don’t remember.” When asked how many sites she visited in 2010, her response was, “I don’t remember.” She testified on March 30, 2011, she did not recall if she visited any jobsites in 2011.

Driskill testified customer numbers, which Respondent assigns to each customer, are listed on their invoices which also state the name of the customer, but Driskill testified she did not provide any invoices in response to the subpoena. She testified there are documents which exist which would show which customer numbers were assigned to each customer. In this regard, Respondent had produced certain time sheets listing the customer number where employees were worked and had provided a list containing customer numbers, but without the names of all of the customers. She testified she did not know where the documents were correlating the customer name with the customer number. However, Driskill testified on March 30, 2011 she could get access to them and they are in the control of her company.

Driskill testified she thought Respondent employee Jeff Douglas is an electrician. Driskill then testified she did not know if he is an electrician. Driskill listed Douglas as an electrician in her pre-hearing affidavit. In view, of Respondent’s lack of cooperation concerning the

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<sup>14</sup> At the hearing, Driskill could not name any different customers to a certainty under BGC from BEC. She testified it was possible the statement in her affidavit was correct. Driskill’s recollection at the hearing was also incredibly hazy as to her continued use of specified vendors following Respondent’s name change to BGC. She could not or would not even state to any certainty what vendors Respondent was using at the time of the hearing. She attributed part of her inability to provide any specifics as to Respondent’s operation to the ongoing case with the Department of Justice, although her explanation was murky at best.

<sup>15</sup> Respondent’s Dunn and Bradstreet report printed March 29, 2011, states that on September 23, 2010, Driskill submitted a projected gross revenue of \$339,921 for 2010. It also states that on September 27, BGC filed a voluntary petition in bankruptcy under chapter eleven.

production of subpoenaed materials, on March 30, 2011, counsel for the Acting General Counsel tendered Driskill a one page summary citing paragraphs 5, 7, 9, 10, 24 and 29 as paragraphs requiring further production under the outstanding subpoenas.

5           The first three days of the hearing took place on March 28, 29, and 30, 2011. Driskill testified on March 28 and 30, 2011. The hearing resumed on April 7, 2011, when Driskill again took the witness stand. At that time, Driskill testified she did not bring with her any documents relating to paragraph 5 of the subpoena relating to materials purchased from vendors from January 1, 2007 to the present. In response to paragraph 7 of the subpoena requesting all documents showing general contractors for which Respondent functioned as a subcontractor, 10 Driskill produced a one page sheet GC Exh. 63 showing contractor numbers, but not names. The numbering system relates to Respondent's billing process. The names of some of the contractors can be gleaned from GC Exh. 12 by matching contractor numbers. However, some of the numbers listed on GC Exh. 63 contained no matching name on GC Exh. 12. Moreover, 15 Driskill provided no underlying documents in support of either summary. Driskill was questioned about her compliance concerning paragraph 9 of the subpoena calling for all documents from August 1, 2009 to the present showing financial expenditures by category. Driskill testified she provided her response to that paragraph when she first received the subpoena. Counsel for the Acting General Counsel stated he had placed into evidence in GC Exhs. 58, 59, and 60 as the 20 documents Driskill had provided relating to what he stated was the relevant period. When Driskill was asked if she provided any information relating to an American Express account Driskill testified she was refusing to answer the question stating she was not going to say she had an American Express account. She testified, "I am not going to say what was charged on the American Express account. It's in a litigation with the Department of Justice." She testified 25 this was not criminal litigation. However, she reiterated she was not going to respond. Then the following exchange took place:

THE COURT: Well, if you refuse to answer, then that's up to you, but I directed you to answer several questions, which you have continually refused to answer.

30 THE WITNESS: And this is one of them, and I am refusing to answer.

Driskill then refused to say whether or not she had a Bank of America account. She testified she was not denying she had one. She testified she refused to provide any records about it on the same basis she had declined to provide records concerning American Express.<sup>16</sup>

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16 Similarly, Driskill testified she did not provide any records concerning expenditures to the following companies: Capitol One, Chase, Citgo, Verizon, Verizon Wireless, Wells Fargo, 40 Wesco Receivables Corp. She testified she was refusing to provide the records. Driskill testified, on April 7, 2011, that she did not provide any additional documents concerning state and federal tax returns, or concerning personal property returns. She testified she did not have any additional documents concerning her tax returns. When asked how she created her tax returns, Driskill testified she spoke to her accountant. She denied presenting her accountant 45 with any documents to prepare her returns. She then testified if she can find a document she will give it to her accountant. Driskill testified she paid her taxes. Driskill then testified whatever she gave her accountant to prepare taxes in 2010, is what she produced for the subpoena. When asked if she gave documents to the bankruptcy proceeding, and she no longer retained a copy Driskill responded, "Possibly." She testified she did not know whether there were other 50 documents concerning her business that she did not produce. Driskill produced summaries of employee rates of pay, rather than cancelled checks.

The hearing resumed on May 5, 2011, at which point Driskill called herself as Respondent's only witness. Driskill testified BGC performs design, build, masonry, carpentry, mechanical, site work, restorations, thermal moisture protection, concrete, metal specialties, windows, doors, finishing, painting, and electrical work based on subcontracts to union businesses such as E.G. Middleton.

Driskill testified concerning the Board 63 forms she filed on March 12 for Locals 80 and 1340 that she checked on the forms a box reading "final report in this local union area." She testified by checking the box she had she explained to the respective locals that she was terminating her relationship with them.<sup>17</sup> While Driskill, when called as an adverse witness, could not recall whether she had created or tendered a position statement with attachments to Region 5 during the investigation, Driskill now testified it was indeed her document and attachments, although he mistakenly testified she tendered it to union attorney Newman rather than to Region 5.

As to the Region's commerce questionnaires signed by Driskill, she testified the document was accurate as of September 3 when she signed it. However, since then the prime contractor Excel Paving received the goods and is paying the bill rather than Respondent. Driskill testified Respondent never received the goods and never paid the bill. Driskill could not state when Excel received the goods which were light poles. When asked if she supplied the contract with Excel to counsel for the Acting General Counsel, Driskill testified "No." Driskill testified she did not know if she signed a contract with Excel, but if she did, she did not keep it.

Several of Respondent's exhibits tendered on May 5, 2011 were placed in the rejected exhibit file based on objections because, though covered by outstanding subpoena paragraphs, they had not been previously tendered by Driskill to counsel for the General Counsel. When this occurred, Driskill was allowed to answer questions concerning the exhibits and related matters by way of question and answer proffer.<sup>18</sup> The following contains a discussion of some of Respondent's exhibits which were placed in the rejected exhibit file. R. Exh. 6 is dated October 1, 2008, and it constitutes the minutes of the Board of Trustees of the Tidewater Electrical Industry Health Fund for a meeting of that date. It was noted in the minutes that BEC was delinquent in fund contributions for the months of May through August 2008. It stated the total unpaid contributions and liquidated damages for the delinquency owed by BEC was \$7,546.98. The minutes went on to state the trustees decided BEC should be advised in writing that effective November, 2008, contributions would no longer be accepted by the fund on behalf of the firm's employees if they were not totally current by October 31, 2008 with respect to all outstanding amounts owed the fund, and the employer's participation would be terminated if they became delinquent at any point after October 31. It stated a motion was made to the effect by Mr. Yonka, seconded by Mr. Middleton and unanimously adopted. On that same date, Driskill was sent by email and regular mail a letter from R. Jan Jennings, attorney at law, on behalf of the Tidewater Electrical Industry Health and Pension Funds. The letter contained an attached accounting as well as the statement that Respondent owed a combined \$10,510.70 to the named health and pension funds for the months May through August 2008, and the failure

<sup>17</sup> Gray testified in rebuttal the Board 63 form is filed with NECA and the x in the box that states "final report in this local union area" only means an employer is completing its work in that area.

<sup>18</sup> In other circumstances, Driskill was allowed to answer questions in her case in chief by way of question and answer proffer for matters in which counsel for the Acting General Counsel represented she had refused to answer prior questions when those questions were posed by someone other than herself.



to submit full payment to Jennings's attention by October 31, 2008 would result in BEC's termination from participation in both funds. Jennings further stated if BEC was not current by October 31, 2008, contributions would no longer be accepted by the funds on behalf of Respondent's employees.

On December 15, 2008, another letter from the Tidewater Electrical Industry Health and Pension Funds was sent to Driskill. It stated:

We have received your October, 2008 reports and contributions. We are sending the reports back to you as Brave Electrical Contracting is no longer able to participate in the Tidewater Electrical Industry Health and Pension Funds as explained to you by fund legal counsel regarding a letter dated October 2. However, we have taken the contributions and applied the money to past contributions still owed to the fund. Attached is a current statement of accounting reflecting what is still owed to the fund.

By letter to Driskill from the same health and pension funds dated January 6, 2009, it was stated:

We have received your November, 2008 reports and contributions. We are sending the reports and contributions back to you as Brave Electrical Contracting is no longer able to participate in the Tidewater Electrical Industry Health and Pension Funds as explained to you by phone and legal counsel regarding a letter dated October 2.<sup>19</sup>

Driskill testified that as of October 1, 2008, she was no longer allowed to have health and welfare for an employee.<sup>20</sup> Driskill testified she did not want to be in the IBEW because they decided she could not pay health and welfare and pension to a union employee.

Driskill testified she was never given instructions on how to fill it out the IBEW required monthly payroll report for electrical contractors. She entered into evidence a series of reports for individual employees for BEC covering the period of February 1 to 29, 2008. She testified she had to do the reports over and over. The reports included a JJ Driskill showing health and welfare contributions, local pension contributions and local union assessments. Similarly,

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<sup>19</sup> The three documents referenced above were part of R. Exh. 6, which during the hearing, I placed in the rejected exhibit file, with the ability of the parties to reargue the matter in their post-hearing briefs. Driskill also attempted to introduce a check from the Southern Electric Retirement Fund dated February 25, 2009, which she testified was returned to her as she claimed that she tried to pay but the money was sent back to her. This document was placed in the rejected exhibit file as not previously produced pursuant to subpoena. Driskill also attempted to introduce a letter from the Southern Electric Retirement Fund dated March 2, 2009 returning a check to BEC for contributions submitted by Respondent for the month of January 2009 for work performed under Local 80's jurisdiction. The letter citing Jennings's letter to BEC dated October 1, 2008, it stated BEC was no longer allowed to participate in the Southern Electric Retirement Fund. While, I do not find Driscoll's failure to timely produce R. Exh. 6, and other related fund documents has been justified on this record, for reasons discussion in more detail below, I have decided to admit this formerly rejected exhibit into evidence because failure to do so might possibly result in a punitive remedy. However, my rulings at the hearing as to any other rejected exhibits or excluded testimony for Respondent's lack of cooperation remain unchanged and those items and that testimony remain excluded from evidence.

<sup>20</sup> Gray testified if one fund tells an employer they need not make contributions, they are still contractually bound to make contributions to the other funds.

Driskill testified she was never told how to properly fill out a Board 63 form, and she had problems filling out the form.

Driskill introduced expense records for two independent contractors providing Respondent with temporary employees to perform electrical work in November 2008 through May 5, 2010. There were two dates shown on the records for 2010, May 2 and May 5. The records begin on November 5, 2008. Driskill testified she did not know how many people were working concerning each of the 2010 payment dates. She testified there was at least one person. Driskill testified she needed these workers because the individual performing work on a contract was removed from the job by an IBEW local. Driskill testified the individual was removed on October 3, 2008. Driskill testified the individual's name is T.P.S. Lloyd. Driskill testified the date of Lloyd's last check is October 3, 2008. Respondent introduced payroll records for Lloyd for pay period September 27, 2008 to October 3, 2008, which Driskill testified represented his last check. Lloyd is listed as an apprentice on the payroll record.<sup>21</sup>

Driskill testified about the circumstances of her pre-hearing affidavit at the hearing, in an effort to disavow portions of her testimony contained therein. I do not find, considering her demeanor and responses at the hearing, Driskill's attempt to disavow the affidavit to be persuasive, noting in particular how she subsequently vouched for its content in one of the answers she supplied to the consolidated complaint. Moreover, I found it was Driskill's intent at the hearing not to cooperate. I find the testimony of her affidavit to be more reliable than that provided at the hearing which was marked by an incredible absence of recall, inconsistency, and at times a refusal to answer questions.

Driskill testified about an employee referred by the Union who she claimed failed drug tests and performed poorly. She testified she never reported the problems with his work to the Union. She named two other employees referred by the Union who she claimed there were similar problems with their performance. Driskill, in fact, testified she had problems with all of the employees referred to her by Local 1340, but she never reported any of these problems to the Union. I do not find Driskill's testimony to be persuasive here. In particular it is undercut by her testimony, that after she stopped using the Union for referrals, she re-hired one of the employees she named as being problematic on her own. Driskill testified she never fired a union employee for poor performance.

Driskill testified BEC is not BGC, and that BEC is no longer in business. She testified BGC subcontracts electrical work to union businesses such as E.G. Middleton. Driskill testified BGC is not doing electrical work. She testified BEC went out of business in July 2010. She testified BGC has not done any electrical work since then. It has done general construction. Driskill testified by way of proffer that BGC is doing design, build, masonry, carpentry,

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<sup>21</sup> Gray testified that in 2008 Lloyd was an apprentice in the Hampton Roads Joint Apprenticeship and Training Program. The Joint Apprentice and Training Committee (JATC) has three labor trustees and three management trustees which supervise the operation of the apprenticeship program. Local 80 has a similar apprenticeship program to the one Local 1340 uses. Gray testified JATC has a director who administers the program and assigns apprentices to employers. The director is not employed by the Union. Rather, the director is employed by the JATC which is jointly funded. If an employer wants an apprentice they contact the JATC director and he refers the apprenticeship assignments under the collective-bargaining agreement. Gray testified the union has no role in the removal of an apprentice from an employer. Gray testified if the director of the JATC removes an apprentice from an assignment it has no effect on the collective-bargaining agreement, or on the letter of assent.

mechanical, side work, restorations, thermal moisture, protection, concrete, metals, specialties, windows, doors, finishing, and painting.

Respondent entered into evidence an employment contract for employees, which Driscoll testified she began using in 2010 after she got out of the Union. Driskill testified she filed for bankruptcy on September 27, 2010. She testified Respondent is still operating as a debtor in possession and Respondent was in reorganization. Driskill testified she does not have a total rate package because she has never given health and welfare and pension. She testified she was eliminated from it. She testified she tried to pay, and made appeals. She testified all the money she paid was refunded on checks signed by Yonka, and E.G. Middleton. Driskill testified she was not allowed per documentation from October 1, 2008 from attorney Jan Jennings to participate in a health and welfare and pension fund and the SERF Fund.

Driskill testified she used E.G. Middleton as a subcontractor after she withdrew from the Union. She testified she thought she withdrew from the Union in March 2010. She was asked what the project Respondent used E.G. Middleton for and Driskill refused to answer. Driskill testified she filed Board 63's since signing the letters of assent in 2003 and she agreed with Moter's testimony concerning it.

## *B. Analysis*

### 1. BEC and BEG are the same company

Driskill is the sole owner and general manager of both companies. Driskill testified they are the same company, and she informed Union Attorney Newman by correspondence dated October 1, 2010 they are the same company. Driskill testified there are no separate business documents for either company. The Articles of Organization for BEC show it was formed as a limited liability company under the Virginia Code on July 7, 2003. Driskill filed an amendment to those articles of organization on July 28, 2010, changing Respondent's name from BEC to BGC. Driskill testified both companies operate under the same articles of organization. While Driskill testified BGC was created to seek general contracting work, her pre-hearing affidavit dated October 12, 2010, reveals that as of that time Respondent bid on only one general contracting job, and that Respondent had not performed any general contracting work. Similarly, at the hearing, Driskill could not specifically site any work that Respondent obtained as a general contractor. Rather, Driskill's testimony in her affidavit, which I credit, reveals BEC and BGC were performing basically, the same work, that is electrical work, for the same customers, and they were buying supplies from the same vendors. The employees employed by BEC and BGC, as stated in Driskill's affidavit were electricians, or otherwise performing electrical work. The motor vehicles used by BGC are registered under the name of BEC. While at points in her testimony, Driskill claimed BEC no longer exists and BGC has not performed any electrical work she produced no documentary evidence to verify that assertion, and her pre-hearing affidavit contained admissions to the contrary. In this regard, Respondent produced no invoices, contracts, successful job bids, payroll records to demonstrate that Respondent has performed anything but electrical work. Thus, I conclude as demonstrated by Driskill's pre-hearing affidavit, her correspondence to Newman, and admissions made during the course of the hearing that BEC and BEG are the same company.<sup>22</sup>

<sup>22</sup> The Acting General Counsel alleges in the alternative that BEG is an alter ego of BEC, that is a disguised continuance of BEC. I have also concluded, based on my findings set forth above that BGC is an alter ego of BEC. I note that BGC did come into existence shortly after and during the period in which Respondent was trying to shed its relationship with the Local 80

Continued

## 2. Respondent falls within the jurisdiction of the Act

The amended consolidated complaint asserts jurisdiction on two grounds. The first is Respondent purchased and received at its Virginia Beach facility products, goods and materials valued in excess of \$50,000 directly from points located outside the state of Virginia. Counsel for the Acting General Counsel requests an adverse inference be drawn against Respondent based on Driskill's failure to produce certain subpoenaed documents pertaining to her business operations and her refusal to answer certain questions pertaining to those operations as documented in the body of this decision.<sup>23</sup> I find such an inference is warranted and have concluded the elements necessary to establish Respondent is an employer operating with the Acts commerce standards can be established by secondary evidence. See *Bannon Mills, Inc.*, 146 NLRB 611, 614 fn. 4, 633-634 (1964); and *Filene's Basement Store*, 299 NLRB 183, 204 (1990). Respondent's Schedule F pertaining to its bankruptcy proceeding reveals that creditors Graybar and Wesco are located in Atlanta, Georgia. The schedule F shows Respondent incurred a claim for Graybar in 2010 of \$27,357 and \$3,557.52 for Wesco. Counsel for the Acting General Counsel argues separately that records Respondent did produce showing accounts payable Respondent purchased and received goods in the amount of \$21,763.43 from Graybar in 2010, and \$22,729.11 from Wesco for purchases across state lines of \$44,492.54 from those companies alone. Using the Graybar's claim for 2010 as reported in the bankruptcy

and 1340, and that Driskill, though unsuccessfully, at the hearing attempted to portray BGC as a different company with a separate business purpose from BEC as part of her effort to void the Unions' contractual claims. I find that BEC and BGC have identical management, business purpose, operation, equipment, customers and suppliers and that they are the same company or in the alternative BGC is an alter ego of BEC. See *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

<sup>23</sup> In this regard, on the first day of the hearing, Driskill failed to produce subpoenaed payroll records, and at first refused to produce documents showing purchases from vendors in 2010. She then testified she would produce what she had but claimed she stopped keeping records of these purchases and that she maintained no receipts or statements from the vendors. Driskill maintained she had no documents including checks which would show Respondent's financial expenditures after August 1, 2009. She maintained she did not have balance sheets or profit and loss statements for 2010 or 2011. Yet, she claimed she would be filing federal and state taxes for Respondent on April 15, 2011 for 2010. I do not credit Driskill's assertion that she maintained no underlying profit and loss statements or balance sheets in order to complete or support her planned tax filings. Driskill also refused to answer what certain debts were for in Respondent's schedule F filing for bankruptcy.

It should be noted that in an amended answer to the consolidated complaint filed on February 3, 2011, Respondent admitted it purchased products, goods and materials valued over \$50,000 directly from points outside the stated of Virginia. Driskill subsequently amended her answer to deny this allegation claiming because she filed for bankruptcy her business never paid for the goods. She then testified she received the goods, but did not pay for them. She then changed her testimony stating the goods were received by a general contractor. However, like most of her claims, Driskill provided no documentary evidence to support this assertion. I find, based on Driskill's initial admissions in her answer and in her testimony that Respondent purchased and received over \$50,000 across state lines as set forth above. There are other factors supporting this conclusion such a list provided by Driskill dated September 24, 2010 showing Respondent had worked on at least 22 jobs as of that date in 2010. Similarly, a Dun & Bradstreet report showed that as of September 23, 2010, Driskill had submitted a projected gross revenue of Respondent of close to \$340,000 for 2010.

proceeding in place of Respondent's reported accounts payable, the total of goods purchased from Graybar and Wesco comes to over \$50,000 relying on Respondent's account payable report from Wesco. Moreover, Respondent's bankruptcy schedule F reports a claim from American Express of \$4,769.86 incurred in 2010, which Driskill specifically refused a directive to explain in her questioning during this proceeding. I have granted the request to draw an adverse inference based on the refusal to produce subpoenaed records and Driskill's refusal to answer questions. I have concluded Respondent purchased and received over \$50,000 across state lines as alleged in the consolidated complaint and that it is an employer in commerce under the Act's jurisdiction.

The consolidated complaint also alleges jurisdiction over Respondent because it signed a letters of assent authorizing ACC NECA to bargain on its behalf and that during the 12 month period preceding the complaint employers who are represented by ACC NECA pertaining to bargaining, including Blackwater Electric Company and E.G. Middleton, Inc., performed services valued in excess of \$50,000 in states other than Virginia. In *Stack Electric*, 290 NLRB 575 (1988), the Board found that by delegating their bargaining rights to an employer association certain named employers met the Board's jurisdictional standards as a group and asserted jurisdiction over the individual employers although there was no claim the named employers met the Board's jurisdictional requirements on an individual basis. In the current case, Blackwater Electric Company (Blackwater) and E.G. Middleton (Middleton) have signed letters of assent delegating their bargaining rights to ACC NECA, as has Respondent. Payrolls for Blackwater and Middleton during the relevant time period show each performed services in Virginia and North Carolina for well over \$50,000. Accordingly, I conclude by its authorization of ACC NECA as collective bargaining representative, Respondent has also met the Board's jurisdictional requirements.

### 3. Respondent's failed in its efforts to terminate its contracts with Local 80 and 1340

The Board has held that a party may not lawfully repudiate an 8(f) construction industry agreement during its term. See, *Cedar Valley Corp.*, 302 NLRB 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992), cert. denied 508 U.S. 907 (1993); and *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 109 S.Ct. 222 (1988). The Board has held interpreting essentially identical agreements in terms of the letter of assent and the underlying contract termination provisions applicable here that in addition to notifying the union of intent to terminate the contract, in order to withdraw future bargaining rights from the bargaining association an employer must notify the association that it is terminating those bargaining rights. *Rome Electrical Systems*, 349 NLRB 745 (2007), enfd. 184 LRRM. 2713 (11th Cir. 2008). In *Rome Electrical Systems*, id. at 749, the Board held that the 150 day notice termination requirement of the employer association letter of assent and the 90 day notice requirement to terminate the contract related to the termination date of the existing contract.

In the instant case, the Inside wire agreement with Local 1340 has effective dates of December 1, 2008 to November 30, 2011, and the Inside collective-bargaining agreement with Local 80 has effective dates from March 1, 2010 to May 13, 2013. The predecessor Inside agreement with Local 80 had effective dates of March 1, 2007 to February 28, 2010. On February 23, 2010, attorney Nabhan sent Locals 80 and 1340 a letter on behalf of Respondent stating Respondent repudiates any and all agreements between the parties citing case support for the proposition that Respondent has the right to take such action because Respondent had only one employee. I do not view Nabhan's letter as fulfilling the 90 notice to terminate the collective-bargaining under contract section 1.02. First, the letter was untimely with respect to Local 80's contract which had a February 28 expiration date. While Local 1340's contract did

not expire until November 30, 2011, the tenor of Nabhan's letter using the term "repudiate" exhibited an intent to terminate contract mid-term, which under Board law unless Respondent has a valid defense it cannot lawfully do. *Cedar Valley Corp.*, supra, and *John Deklewa & Sons*, supra. Moreover, there was no reference in Nabhan's letter to meeting a 90 notice requirement concerning section 1.02 and I find that was not the intent of his letter. As to Local 80, since Respondent did not provide the required 150 day written notice to either local or NECA to terminate its letter of assent of its bargaining rights to NECA, I find that Respondent is bound by Local 80's successor agreement effective from March 1, 2010 to May 13, 2013.

Nabhan cited *D & B Masonry*, 275 NLRB 1403 (1985) in his February 23 letter, in support of Respondent's claim that it could repudiate the collective-bargaining agreements raising an argument that an employer may withdraw recognition and repudiates its contract when it had one or fewer employees on a permanent basis. However, in *Galicks, Inc.*, 354 NLRB No. 39 (2009), remanded on other grounds 188 L.R.R.M. 3024 (6th Cir. 2010), the Board stated it is a respondent employer's burden of proof to establish it has a stable one person unit. In finding the respondent employer there did not sustain that burden; the Board specifically took into account fluctuations which it stated are typical in the construction industry. It stated, "To prove a stable *one-man unit*, the Respondent relies on the 15 months it employed journeyman-substitute Paternoster before withdrawing recognition. But the Respondent employed no journeymen for almost 16 months between August 2002 and December 2003, and then subsequently employed as many as three journeymen at a time. Thus, the evidence the Respondent relies on fails to prove a stable *one-man unit*." Similarly, in *McDaniel Electric*, 313 NLRB 126 (1993), the Board noted it would require proof that the purportedly single employee unit was a stable one, not merely a temporary occurrence. In *McDaniel Electric*, supra., although the respondent employer employed only one employee at the start of a project, in the 13-week period preceding the hearing it employed two or more employees during at least 5 of those weeks. In finding the respondent had not established it had a stable one-employee unit the Board noted the respondent's employment at the project was typical of employment fluctuations in the construction industry. In *McDaniel Electric*, supra, the Board distinguished *D & B Masonry*, supra, noting that there the employer employed only one employee at the time of the hearing and the most recently laid-off unit employees had no reasonable expectation of reemployment, or worked elsewhere.

In the present case, Driskill faxed to Newman on October 1, a packet of documents including time sheets for 2010 showing: Jeff Driskill<sup>24</sup> worked various hours for Respondent

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<sup>24</sup> It is well established that the party asserting supervisory status bears the burden of proof on the issue, *Oakwood Healthcare*, 348 NLRB 686, 687 (2006); and *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-12 (2000), and that burden must be carried as to the particular individual who is alleged to be a supervisor. There was no contention before me that Jeff Driskill was or is a statutory supervisor, and his status was not litigated in this proceeding. Driskill stated in her pre-hearing affidavit that her employee Jeff Driskill serves as the "Executive Manager/Operations Manager." She testified at the hearing that Jeff Driskill submits bids on behalf of Respondent. It is stated in the affidavit that in 2010 Respondent employed eight employees, not including Jeff Driskill, as electricians and electrician assistants. As to Jeff Driskill, in her affidavit, Driskill states Jeff Driskill was the only employee of Respondent at the time of Nabhan's February 23 letter. However, Respondent's time sheets show employees Murphy and Douglas were also on Respondent's payroll during the week beginning February 20. The affidavit states the employees report directly to Jeff Driskill, and that he solicits employees, although Driskill, herself does the hiring and firing. Driskill stated in the affidavit that in 2010, including Jeff Driskill, nine employees have performed work on jobs. She stated

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from December 26, 2009 to September 24, 2010; Jeff Douglas worked various hours from January 2 to September 24; Clifton Tomlinson worked various hours from March 22 to June 25; John Wells worked various hours from April 17 to September 17; Daniel Scriver worked various hours from May 22 to July 30; and Bryant Page worked various hours from July 31 to August 20. Moreover, Respondent reports to the Virginia Employment Commission for the quarter ending on September 30, 2010, show Respondent made wage payments to Jeff Driskill, Page, Scrivner, Douglas, and Wells. Respondent made wage payments to employees Brisco, Jeff Driskill, Scrivner, Douglas, Tomlinson and Wells during the quarter ending June 30, 2010. Respondent made wage payments to employees Murphy, Jeff Driskill, Scott and Douglas during the quarter ending March 31, 2010.<sup>25</sup> I find these wage records reveal that Respondent, which reported at least 22 projects during 2010, through October of that year has exhibited a fluctuating work force typical in the construction industry consisting of more than one employee. In other words Respondent has failed to meet its burden of establishing it has a stable one-employee unit, and I reject that as a basis for its repudiation of its collective-bargaining agreements with Local 80 and Local 1340.<sup>26</sup>

Respondent also raised testimony and attempted to introduce documents which it had not produced in response to a subpoena in Respondent's own case in chief showing that, due to past delinquencies, that in late 2008 Respondent was barred from further participation in the Tidewater Electrical Industry Health and Pension Funds. By letter dated January 6, 2009, those

therein that employees Scott, Page, Jeff Driskill, Douglass and Wells are electricians; and Tomlinson, Scrivner, Murphy, and Brisco are assistants to electricians. It states in the affidavit that all of the electricians, which included Jeff Driskill in the description, received \$23 per hour. Respondent submitted into evidence samples of monthly payroll reports for 2008, which included Jeff Driskill receiving journeyman's pay and showing certain contributions were made to the collective-bargaining agreement benefit funds on his behalf. It is clear, Jeff Driskill has performed work as a journeyman electrician for Respondent, and he was treated as such under the Unions' contracts during the time Respondent was honoring those agreements. The record does not establish that he served as a statutory supervisor. In fact, Driskill testified in her pre-hearing affidavit, that Nabhan's February 23, letter that Respondent only had one employee was true "as Jeffrey Driskill was the only employee of Brave Electrical Contracting at the time." As set forth above, Driskill's statement in her affidavit as to the number of employees was incorrect. Thus, even assuming that it could be established that Jeff Driskill was a statutory supervisor in February 2010, or beyond, by excluding Jeff Driskill from the employee count, Respondent's records, as set forth above, do not establish it employed or employs a stable one employee unit. However, since Respondent has failed to contend or establish that Jeff Driskill is a statutory supervisor, I have considered him to be an employee for purposes of this decision.

<sup>25</sup> Respondent's records reveal it also used a temporary employee referral company for electrical workers in May 2010. The contracts with Local 80 and 1340 call for an exclusive hiring hall providing those Locals with a first opportunity to refer for work within their jurisdiction. If this work was within the jurisdiction of those locals, and had Respondent applied the respective contracts it would have increased the size of Respondent work force during that period.

<sup>26</sup> Counsel for the Acting General Counsel requests an adverse inference in his brief based on Respondent's failure and refusal to produce certain subpoenaed payroll records in this proceeding. Indeed Respondent failed to produce payroll records showing hours worked, job location, and rates of pay during the relevant time period which would warrant the drawing of an adverse inference. However, I find there were sufficient records entered into evidence to justify a conclusion that Respondent has failed to establish it employs a stable one employee work force, without the need to rely on an adverse inference.

same funds returned Respondent's November 2008 contributions to Respondent stating Respondent was no longer allowed to participate. At the hearing, counsel for the Acting General Counsel moved to exclude this evidence because of Respondent's failure to produce it. However, unlike other evidence, which I have excluded, I have concluded the evidence of these funds barring Respondent's participation should be admitted. First, I find an order requiring Respondent to reimburse funds for which it had been previously barred from participation would be punitive rather than remedial. Second, the evidence revealed that although these documents were not properly produced, counsel for the Acting General Counsel should not have been surprised by their existence as the correspondence reveals that Yonka was aware of and participated in barring Respondent's participation in the named funds. As counsel for the Acting General Counsel states in his post-hearing brief, "That fact that two funds which are part of the Local 80 CBA no longer allowed Respondent to contribute does not have any impact whatsoever on Respondent's other obligations under the CBAs. As discussed above, counsel for the Acting General Counsel's Complaint, GC 36, does not allege as violations Respondent's failure to contribute to the funds which did not accept Respondent's contributions." G.C. Brief at 34, fn. 74.

Respondent also claims one of the local unions removed an employee named Lloyd from one of Respondent's jobsites on October 3, 2008, causing Respondent to resort to using referral agencies for temporary employees to complete the work. Lloyd is listed as an apprentice in Respondent's payroll records. It was the testimony of Gray, that the assignment of apprentices is not controlled by the local union, but rather by the director of joint apprenticeship program. Regardless, the collective-bargaining agreements provide for a staffing ratio of a certain amount of journeymen per each apprentice. Yet, Driskill's testimony implied that the only employee on the jobsite was an apprentice. There was no evidence that Respondent ever filed a grievance over Lloyd's removal. Respondent provided no direct evidence that Locals 80 or 1340 refused Respondent's requests for employees thereafter. Accordingly, I credit Yonka and Gray's testimony that they Unions did not refuse to refer employees to Respondent for work which was within the jurisdiction of the respective local unions. Finally, Respondent argues that some of the employees referred by the Union's performed poorly and/or worked under the influence of an unlawful substance. Here again, Respondent's claims were unsubstantiated. There is no claim that any of the employees were disciplined or that Respondent informed the Unions of problems with the referrals. In fact, Driskill testified she rehired one of the supposed problem employees on her own, after Respondent stopped seeking referrals from the Union. In sum, I do not find Respondent has established any basis justifying its repudiating its contracts with and withdrawing recognition from Local 80 and 1340.

The original consolidated complaint alleged that on or about February 23, Respondent, by letter, withdrew its recognition of Locals 80 and 1340, and since said date Respondent has failed to continue in effect all the terms and conditions of employment its collective-bargaining agreements with those local unions.<sup>27</sup> The original consolidated complaint alleges the charge in Case 5-CA-36058 was filed by Local 80 on August 20, and served by mail on Respondent on August 26, 2010. It asserts the charge by Local 1340 was filed on August 20, 2010, and served on Respondent by mail on August 27, 2010. As originally plead the allegations in the complaint appear to be barred by the timeliness considerations of Section 10(b) of the Act. See, *McWhorter Trucking*, 273 NLRB 369, 378 (1984) for an example of the calculation of the file and

<sup>27</sup> The February 23 date was in fact used by Attorney Newman who filed the unfair labor practice charges on behalf of the Local 80 and 1340 as the date Respondent ceased recognizing the Local Unions and failed to abide by their collective-bargaining agreements.



serve requirements and the calculations of the timeliness of an unfair labor practice charge.

However, at the hearing, counsel for the Acting General Counsel moved without objection to amend the consolidated complaint to allege that it was in fact March 5, not February 23 in which Respondent withdrew recognition from and repudiated the collective-bargaining agreements with Locals 80 and 1340. Nabhan's letter of February 23, to Locals 80, 666, and 1340 states BEC hereby notifies the named locals that it "repudiates any and all agreements between the parties." The letter later continues that "We will presume that the Unions accept this repudiation unless we hear to the contrary no later than March 5, 2010 at 5:00 p.m." I assume that complaint was amended to reflect the March 5, date as the effective date of the contract repudiation based on the March 5 date in the letter given as a deadline as a response by the Unions. There is no contention that the Union's responded by March 5. Moreover, there was no basis provided as the Acting General Counsel's change to the March 5 date in the consolidated complaint, other than by implication as a means to avoid a finding that the unfair labor practice charges were untimely filed and served. This is particularly so when Union attorney Newman, who filed the charges and who was engaged in correspondence with Respondent over the matter viewed February 23 as the effective date of the repudiation when he filed the charges as that was the date he listed in the charges.

Respondent, who was unrepresented, failed to raise a Section 10(b) defense in its answer or at the hearing either before or after the complaint was amended to the March 5 repudiation date. The Board considers Section 10(b) defense as waived if it is not timely raised. See, *Wine and Liquor Store Employees Union, Local 122*, 261 NLRB 1070 fn. 1 (1982); *Taft Broadcasting Co.*, 264 NLRB 185, 190-191 (1982), petition dismissed mem. 712 F.2d 1418 (11th Cir. 1983); and *McKeeson Drug Company*, 257 NLRB 468 fn. 1 (1981). Since the timeliness of the unfair labor practice charges was not raised or litigated in before me, Board precedent requires that I do not consider a Section 10(b) defense here.<sup>28</sup> Accordingly, I find as alleged in the amended consolidated complaint that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition of Locals 80 and 1340 on March 5, 2010, and repudiating their collective-bargaining agreements as of that date.

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<sup>28</sup> In reaching the conclusion that there was no Section 10(b) defense litigated before me, I note that Driskill testified she provided the Union's notice of the termination of their relationship by checking a box on the Board 63 form marked as final report in this local union area on the form. The form is dated March 12, 2010, although it is marked as received by Local 1340 on March 9, 2010. A similar form tendered by Respondent to Local 80 contains the same dates, creating somewhat of an ambiguity as to what date Respondent viewed as the effective repudiation date. In any event, an argument can also be raised that Respondent's continuing correspondence with the Unions after February 23, indicated Respondent was not certain it had terminated the relationship. For instance Nabhan's letter to Yonka and Avery dated May 6, states, "Will you please do me a favor and send me a letter that states that Brave Electrical is no longer a unionized contractor. I will owe you one." Thus, there are matters pertaining to the Section 10(b) period that could have been litigated had the defense been timely raised. While it may appear it may appear harsh to hold an unrepresented party to the standard of timely asserting a Section 10(b) defense, the 10(b) limitations period applies to employees when they file a charge, and serves to bar a charge as untimely when filed beyond that period, even though in most cases employees are unrepresented at the time of filing. It seems that an unrepresented party should be held to the same standard when it fails to timely raise Section 10(b) as an affirmative defense.

## CONCLUSIONS OF LAW

1. Brave Electrical Contracting, LLC and Brave General Contracting, LLC (jointly referred to as Respondent.) are and have been the same business entity and/or alter egos.

2. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. International Brotherhood of Electrical Workers, Local No. 80 (Local 80) and International Brotherhood of Electrical Workers, Local No. 1340 (Local 1340) are each labor organizations within the meaning of Section 2(5) of the Act..

4. By failing and refusing since March 5, 2010 to adhere to the terms of the 2010 to 2013 agreement between Local 80 and ACC NECA Inside Agreement and to the terms of the 2008 to 2011 agreement between Local 1340 and the Hampton Roads Division of ACC NECA, as well as current agreements for which Respondent has also failed to properly withdraw representation from ACC NECA prior their implementation Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By refusing since March 5, 2010, to recognize Local 80 and Local 1340 as the representative of its employees in the collective bargaining units described in each of their respective collective-bargaining agreements Respondent has violated Section 8(a)(1) and (5) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. To remedy the 8(a)(5) and (1) violations, the Respondent must be ordered to: (1.) comply with the exclusive hiring hall provisions and the terms and conditions of employment in the current ACC NECA Local 80 and ACC NECA Local 1340 Inside agreements and to offer full and immediate employment to those individuals on Local 80 and Local 1340's out of work list who on and since March 5, 2010, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions, as provided in *J. E. Brown Electric*, 315 NLRB 620 (1994); (2) for the period beginning March 5, 2010 to make whole its employees in the bargaining units of Local 80 and Local 1340, as well as those individuals who were denied an opportunity to work, for losses suffered as a result of its failure and refusal to pay contractual wage rates and fringe benefits in the requisite Inside agreements as provided in *R. L. Reisinger Co.*, 312 NLRB 915 (1993) and *Williams Pipeline Co.*, 315 NLRB 630 (1994); (3) to reimburse these employees and individuals for any expenses ensuing from its failure to make the required contributions to the benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981); and (4) to make whole the appropriate fringe benefit trust funds for losses suffered, by making contributions to the funds to the extent that contributions would have been made on behalf of these employees and individuals if it had complied with the requisite Inside agreement in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).<sup>29</sup> The amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682

<sup>29</sup> As set forth above, I have found Respondent was barred from participation in the Tidewater Electrical Industry Health and Pension Funds. Therefore, I shall not require Respondent to make any contractual payments to those funds as part of this remedy, or to reimburse employees for any monies that would have been contractually be required to be paid to those funds, or for losses employees may have suffered for Respondent's failure to make those payments.

(1970), enfd. 444 F.2d 502 (6th Cir. 1971), less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent is only required to tender dues payments to the  
 5 respective unions for employees who had signed a dues check off authorization at the time the dues should have been forwarded.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>30</sup>

## ORDER

The Respondent, Brave Electrical Contracting, LLC d/b/a Brave General Contracting, LLC its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the Local 80 and Local 1340 and comply with the hiring hall provisions and the terms and conditions of employment in their current Inside agreements with ACC NECA.

(b) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer full and immediate employment to those individuals on the Local 80 and Local 1340's out of work list who on and since March 5, 2010, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions in the applicable Inside agreement between those unions and ACC NECA, for all positions currently in existence where employees are performing electrical work replacing any individuals or independent contractor's employees in those positions who were not referred in turn by the referral procedures as provided in local union's respective collective bargaining agreements.

(b) For the period beginning March 5, 2010, make whole its employees in the Local 80 and Local 1340 bargaining units, as well as those individuals who were denied an opportunity to work, for losses suffered as a result of its failure and refusal to adhere to the applicable Inside agreements; reimburse them for any expenses ensuing from its failure to make the required contributions to the benefit funds; and make whole the benefit trust funds for losses suffered, and dues payments in the manner set forth in the remedy section of the decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by Region 5, post at its Virginia Beach, Virginia facility and any other work locations or jobsites copies of the attached notice marked "Appendix."<sup>31</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and

<sup>30</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>31</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 5, 2010. Signed copies of said notices shall also be tendered by Respondent to Local 80 and Local 1340 for posting at their hiring halls should they desire to do so.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 18, 2011

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Eric M. Fine  
Administrative Law Judge

Beach, VA

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize International Brotherhood of Electrical Workers, Local No. 80 (Local 80) and International Brotherhood of Electrical Workers, Local No. 1340 (Local 1340) for jobsites within their geographical jurisdiction as provided for in their current Inside collective-bargaining agreements with ACC NECA or fail to comply with the hiring hall provisions and the terms and conditions of employment in those collective-bargaining agreements as described in the remedy section of the decision of the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer full and immediate employment to those individuals on the Local 80 and Local 1340's out of work list who on and since March 5, 2010, were denied an opportunity to work for us because of our failure and refusal to comply with the hiring hall provisions in the applicable Inside agreement between those unions and ACC NECA, for all positions currently in existence where employees are performing electrical work replacing any individuals or independent contractor's employees in those positions who were not referred in turn by the referral procedures as provided in local union's collective bargaining agreements for work being performed within their jurisdictions.

WE Will for the period beginning March 5, 2010, make whole our employees in the Local 80 and Local 1340 bargaining units, as well as those individuals who were denied an opportunity to work, for losses suffered as a result of our failure and refusal to adhere to the applicable Inside agreements, and reimburse them for any expenses ensuing from our failure to make the required contributions to the benefit funds for losses suffered, and make the required benefit fund contributions and dues payments in their behalf in the manner set forth in the remedy section of the decision of the National Labor Relations Board.

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Brave Electrical Contracting, LLC d/b/a Brave  
General Contracting, LLC  
\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

103 South Gay Street, The Appraisers Store Building, 8th Floor,  
Baltimore, MD 21202-4061 ,  
Hours: 8:15 a.m. to 4:45 p.m.  
(410) 962-2822

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-3113.

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